

No. 79111-2

FAIRHURST, J. (concurring in dissent) – I find I cannot join either the majority or the dissent. I cannot join the majority’s holding that John Charles Anderson’s consensual relationships with four adult men constitute recent overt acts.¹ The majority misstates the record, and the conduct at issue is not sufficiently related to Anderson’s diagnosis and pattern of nonconsensual, abusive relationships with children, and inappropriate behavior toward women. I cannot join the dissent because it unnecessarily posits a new definition of a recent overt act² and implies the statutory definition is unconstitutional.³ Because of the flaws in both opinions, I write separately to explain why application of our statutes and case law demonstrates the State failed to prove Anderson committed a recent overt act.

Former RCW 71.09.020(10) establishes that a “[r]ecent overt act” is “any

¹The definition of “[r]ecent overt act” in former RCW 71.09.020(10) (2006), *recodified as* RCW 71.09.020(12) defines the act or threat. Because I find the alleged acts fail to meet the definition, there is no need to address whether or not Anderson’s actions were recent.

²“Thus, a recent overt act is an act presenting an actual or obvious danger of substantial physical harm or a threat of an actual or obvious danger of substantial physical harm caused by the individual’s diagnosed mental or personality disorder.” Dissent at 17.

³“To satisfy due process the legislature’s addition to the recent overt act requirement demands a causal relationship between the person’s diagnosed mental or personality disorder and his conduct.” Dissent at 14. Justice Sanders presented this same theory in his concurrence in *In re Detention of Lewis*, 163 Wn.2d 188, 177 P.3d 708 (2008).

act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person.” The State’s expert, Dr. Amy Phenix, testified that Anderson’s relationships with four adult male patients at Western State Hospital (WSH) qualified as recent overt acts. Based on her assessment, the trial court found that Anderson’s “conduct with respect to these patients” constituted a recent overt act. Clerk’s Papers (CP) at 188. Although Anderson’s partners are characterized as “vulnerable,” CP at 187, neither the State nor Anderson’s partners claimed that any actual harm of a sexually violent nature resulted from these relationships. Dr. Larry Arnholt, who described Anderson’s WSH partners at trial, testified that “he was unaware of any coercive or forceful aspects to any of these sexual relationships.” CP at 181. Contrary to the majority’s assertion, there is no testimony that any of the partners had developmental or psychiatric disabilities that rendered them legally incapable of consenting. Majority at 4.⁴ We must determine whether there is sufficient evidence that Anderson

⁴The evidence closest to the premise that a partner was incapable of consenting occurred when Dr. Arnholt testified:

Well, the indication was that [Darryl] was developmentally disabled, certainly not a consensual equal partner. That’s something that we focused on the group, that a person should be functioning on the same level, that they should be competent to make a decision, and that a relationship, an equal relationship should clearly be established, because the context of the group indicates that any sexual offense uses

committed a recent overt act under former RCW 71.09.020(10), which in this case means whether the State proved beyond a reasonable doubt that Anderson's consensual sexual relationships with these four vulnerable adults created a reasonable apprehension of sexually violent harm in the mind of an objective person who knows Anderson's history and mental condition.⁵

Whether an individual's actions constitute a recent overt act is a mixed question of law and fact. *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). I disagree with the majority's application of the law to the facts. In *Marshall*, this court adopted a two-step analysis for determining whether an act qualifies as a recent overt act for the purposes of a sexually violent predator petition.

somebody or something as an object, and it was certainly not considered acceptable. So we focused on the quality of the relationship for sexual contact to be something that would be positive.

1 Verbatim Report of Proceedings (VRP) at 74-75. Prior to that testimony, the assistant attorney general explicitly told the trial court she would not elicit testimony from Dr. Arnholt regarding whether the relationships were consensual or not. 1 VRP at 72. Testifying that the partner was functioning at a different level than Anderson, with nothing more, is not the same as testifying the partner was incapable of consent.

⁵There is no need to analyze whether Anderson meets the definition of a "[s]exually violent predator," former RCW 71.09.020(16) (2006), *recodified as* RCW 71.09.020(18), as the dissent does, dissent at 15-16, or ponder why the State decided to file its petition when it did, dissent at 19-20.

[F]irst, an inquiry must be made into the factual circumstances of the individual's history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature.

Id.

Under *Marshall*, we first look to the factual circumstances of Anderson's history and mental condition. Dr. Phenix diagnosed Anderson with sexual sadism, pedophilia, and a personality disorder with antisocial, borderline, and narcissistic traits. His past offenses include anally raping a two-and-a-half-year-old boy (1988), assaulting his roommate (1988), and exposing himself to a female adult staff member (1989). During therapy sessions at WSH, Anderson admitted to sexual fantasies involving women, fantasies about sexual molestation of young boys and girls, and two other rapes of children.⁶ The State also submitted evidence about Anderson's breaking WSH rules regarding alcohol consumption and leaving the hospital grounds without permission. For purposes of the factual inquiry, Anderson has a pattern of nonconsensual, abusive sexual relations with children and inappropriate sexual behavior toward women.

⁶Anderson said that when he was 13, he sexually molested an 11-year-old boy. When he was 15, he anally raped a 13-year-old boy. Anderson was not charged or convicted for either incident.

The second part of the *Marshall* test is the legal inquiry. The test requires a reasonable connection between the claimed recent overt act and the individual's history and mental condition in the view of an objective person.⁷ Former RCW 71.09.020(10). The alleged recent overt acts include Anderson's sexual relationships with four adult male patients at WSH: Darryl, who is mildly to moderately retarded; Bobby, who is mildly retarded; Curtis, who is mildly retarded; and Rory, who has low average intelligence and borderline personality disorder. Although the majority chooses to analyze Anderson's fantasies as alleged overt acts, they are more appropriately addressed as evidence of his mental condition and history. Because no evidence was presented to show that Anderson's rule breaking behavior correlates to his diagnosis, these actions bear no reasonable relation to an apprehension of sexually violent harm.⁸

Thus, the alleged recent overt acts at issue are Anderson's consensual sexual

⁷While the alleged recent overt acts and Anderson's mental condition and history must be reasonably related, there is no statutory requirement for a causal nexus. See *In re Det. of Froats*, 134 Wn. App. 420, 140 P.3d 622 (2006) (holding Froats' unwanted touching of an inmate who had developmental age of five and his possession of hundreds of photos of children constituted recent overt act), *review denied*, 160 Wn.2d 1022 (2007); *State v. McNutt*, 124 Wn. App. 344, 351, 101 P.3d 422 (2004) ("Although the act of communicating here involved a girl rather than boys, we conclude that it constitutes a recent overt act.").

⁸Compare with *In re Detention of Broten*, 130 Wn. App. 326, 122 P.3d 942 (2005), where Broten's violation of his release conditions by going to a children's playground is reasonably related to his mental condition and history.

relationships with fellow adult male patients. None of Anderson's partners filed any complaints against him, although WSH staff urged all parties to end the relationships. Dr. Phenix characterized the relationships as exploitive but did not describe them as abusive. Again, no witness testified that the relationships were nonconsensual. The question is whether these relationships create a reasonable apprehension of sexually violent harm, given Anderson's diagnosis and pattern of nonconsensual, abusive sexual relations with children and inappropriate behavior toward women.

Anderson's consensual relationships with the four adult male patients at WSH do not produce a reasonable apprehension of sexual violence given his history and diagnosis.⁹ Although Dr. Phenix said that Anderson's relationships were akin to his past assaults on children, neither she nor Dr. Arnholt characterized Anderson's partners as having the developmental ages of children.¹⁰ Nor did anyone claim the

⁹Aside from its blanket statement that Anderson's exploiting vulnerable adults was closely akin to his assaults on children, the majority provides no further analysis to explain the connection. Majority at 8. As a result, it does not account for the fact, unlike Anderson's child victims, that there is no evidence demonstrating any of the partners could not consent to the relationship. Further, because of the limited discussion on the partners' developmental and psychiatric disabilities, it appears that, according to the majority, Anderson's partners could have had any form of developmental or psychiatric disability, however slight, and it would constitute a recent overt act.

¹⁰While Dr. Arnholt describes the partners in a range from mildly to moderately retarded, there is no reference as to their developmental ages. Compare with *Marshall*, 156 Wn.2d at 159 (Marshall's nonconsensual sex with a developmentally disabled woman who had a developmental

relationships were nonconsensual or abusive. The relationships were with men and do not have any reasonable relation to Anderson's history of inappropriate behavior toward women. Because Anderson's consensual relationships with adults did not cause sexually violent harm and do not create a reasonable apprehension of sexually violent harm in light of his history and mental condition, the Court of Appeals' finding that he is a sexually violent predator should be reversed. I dissent.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Debra L. Stephens

Justice Tom Chambers

age of 10 to 12 constituted an overt act); *Froats*, 134 Wn. App. at 427 (Froats' unwanted sexual advances toward a fellow inmate who had a developmental age of 5 was an overt act).